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No. 03-1619

In The

Supreme Court of the United States

GDF REALTY INVESTMENTS, LTD.;
PARKE PROPERTIES I, L.P.; &
PARKE PROPERTIES II, L.P.,

Petitioners,

v.

GALE A. NORTON, Secretary of the Interior, et al.,

Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals for the Fifth Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF THE PETITIONERS

Thomas J. Ward*
Felicia K. Watson
National Association of
Home Builders
1201 15th Street, NW
Washington, D.C. 20005
(202) 866-8200
* *COUNSEL OF RECORD*

INTEREST OF AMICUS CURIAE

The National Association of Home Builders ("NAHB") has received the parties' written consent to file this brief as Amicus Curiae in support of Petitioner. Letters of consent have been filed with the Clerk of the Court.[1]

NAHB represents over 215,000 builder and associate members throughout the United States. Its members include not only individuals and firms that construct and supply single-family homes, but also apartment, condominium, multi-family, commercial and industrial builders, land developers and remodelers. NAHB is the voice of the American shelter industry. Through the regular course of operating their businesses, NAHB's members are subject to regulations under the Endangered Species Act ("ESA"). Therefore, NAHB is knowledgeable of the ramifications of inequitable regulatory actions and time-consuming processes that are often involved with land development.

Furthermore, NAHB has cultivated expertise in the constitutional and statutory issues in this matter, particularly in light of its status as the lead plaintiff in *National Ass'n of Home Builders, et al. v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997), *cert. denied*, 524 U.S. 937 (1998). The matter concerned the constitutionality of regulating land development due to a fly that only lives in California.

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[1] Pursuant to Rule 37.6 of this Court, Amicus Curiae states that its counsel authored this brief and amicus paid for it. The brief was not written in whole or part by counsel for a party, and no one other than amicus made monetary contribution to its preparation.

Finally, NAHB has been before the Court as *amicus curiae* or "of counsel" to the landowner in a significant number of land regulation cases. These include *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304 (1987); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987);[2] *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Communities for a Great O--.*, 515 U.S. 687 (1995); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 537 U.S. 99 (2002); *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 124 S. Ct. 1537 (2004).

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[2] The Court's opinion cited NAHB's brief. 483 U.S. at 840.

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INTRODUCTION

Under the Endangered Species Act ("ESA"), it is unlawful to "take" an endangered species without a permit. To "take" a species is to harass, harm, hunt or kill it. *See* 16 U.S.C. § 1532. The Fish and Wildlife Service ("FWS") may issue permits to "take" endangered species incidental to conducting an otherwise legal activity. 16 U.S.C. § 1539. In the case below, the FWS denied the Petitioners a permit to "take" a certain number of insects (karst invertebrates) as an incident to developing their property. In the courts below, the Petitioners argued that the application of the "take" prohibition to the intrastate, non-economic karst invertebrates violates the Commerce Clause.

The Court of Appeals for the Fifth Circuit, affirming the District Court opinion, held that the FWS's application of the "take" prohibition in this case did not violate the Commerce Clause. In an opinion that ignored the Petitioners' as applied challenge, the Fifth Circuit explained that the "taking" of karst invertebrates would not have a substantial relationship to interstate commerce. Yet, it held that because the taking of all endangered species would have an impact on interstate commerce, the FWS did not violate the Commerce Clause by applying the ESA's "take" provision to the karst invertebrates.

By upholding FWS's interpretation and addressing the question of whether that interpretation was constitutional, the Fifth Circuit opinion conflicts with two rules of statutory construction as established by this Court. In addition, in conducting its Commerce Clause analysis, the Fifth Circuit expanded its review beyond the facts of this case. This analysis differs from the analyses conducted by other Circuit Courts and illustrates how the lower courts are inconsistently examining statutes that do not contain a

"jurisdictional element." Certiorari is warranted in this matter to address these issues.

ARGUMENT

I. THE FIFTH CIRCUIT'S ANALYSIS VIOLATED TWO RULES OF STATUTORY CONSTRUCTION EMPLOYED BY THIS COURT.

Congress enacted the Endangered Species Act ("ESA") to "provide a program for the conservation of [ ] endangered species." 16 U.S.C. §1531(b). One means of conservation is the prohibition against "taking" species that the Secretary of the Interior, through the Fish and Wildlife Service ("FWS"),[3] has declared "endangered." *See* 16 U.S.C. §§ 1533, 1538. In the case below, the Fifth Circuit addressed whether the FWS's application of the "take" prohibition to the Petitioners ("GDF Realty") request to modify "karst invertebrate" habitat violated the Commerce Clause. The Court of Appeals upheld FWS's interpretation of the ESA without any clear indication that Congress meant to reach wholly intrastate, non-commercial species. *GDF Realty Investments, LTD v. Norton,* 326 F.3d 622 (5th Cir. 2003), *reh'g and reh'g en banc denied,* 362 F.3d 286 (5th Cir. 2004), *petition for cert. filed,* No. 03-1619 (U.S. May 27, 2004). The Fifth Circuit's analysis violated two tenets of statutory construction.

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[3] For certain fish species the Secretary of Commerce, through the NOAA Fisheries, determines whether the species is "endangered."

A. The Fifth Circuit Failed to Abide by The Clear Statement Rule Thereby Reaching a Constitutional Issue it Should Have Avoided.

The "most important" rule of statutory construction "is the clear statement rule." *See* Laurence Tribe, *American Constitutional Law* Vol. I, § 5-9 at 853 (3d ed. 2000). By addressing the constitutionality of the ESA take prohibition, the Fifth Circuit ignored the clear statement rule and contravened the precedent of this Court.

1. If an Agency Determination Invokes The Outer Limits of Congress's Power, Courts Must Find a Clear Indication From Congress Before Addressing Constitutional Questions

In *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988), this Court addressed the tension between a statutory interpretation of the National Labor Relations Board ("NLRB") that proscribed a union from handing out leaflets (handbilling) and the First Amendment's protection of free speech. In analyzing the NLRB interpretation, the Court explained, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Id.* at 575. Thus, because the NLRB's construction "pose[d] serious questions . . . under the First Amendment" without a clear indication from Congress that the statute should proscribe peaceful handbilling, the Court struck down NLRB's interpretation. *Id.* at 576.

Similarly, in *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) (hereinafter "*SWANCC*"), the Court addressed the tension

between a statutory interpretation[4] of the Army Corps of Engineers, allowing it to regulate isolated ponds due to the presence of migratory birds, and Congress's authority to regulate interstate commerce. Citing *Edward J. DeBartolo*, the Court clarified that when "an administrative interpretation of a statute invokes the outer limits of Congress' power, [it expects] a clear indication that Congress intended that result." *Id.* at 172. In applying this rule, the Court focused on two issues raised by the Corps's interpretation. First, by regulating isolated ponds, the Corps's construction "result[ed] in a significant impingement of the States' traditional and primary power over land use and water." *Id.* at 173. Second, for the Court to resolve whether the Corps's interpretation was lawful under the Commerce Clause, it would have had to decide whether the activity that the Corps was regulating was the filling of the ponds, or the Petitioner's construction and operation of a municipal landfill. *Id.* The *SWANCC* Court explained that these issues raised "significant constitutional questions." *Id.* at 174. Therefore, since there was not a clear statement from Congress that it meant for the statute to reach the isolated ponds, the Court avoided the constitutional issues and did not accept the Corps's interpretation. *Id.*

Similar to the Corps's interpretation of the CWA in *SWANCC*, here FWS's application of the take prohibition to the Petitioners "invoke[d] the outer limits of Congress' power" in at least three different ways. *Id.* at 172. Therefore, in accordance with the clear statement rule, before reaching the constitutionality of the FWS's application of the ESA under the Commerce Clause, the

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[4] In *SWANCC*, the Corps had construed the Clean Water Act ("CWA") to allow itself to regulate isolated ponds and lakes. *SWANCC*, 531 U.S. at 168.

Fifth Circuit needed to search for and find a clear indication from Congress that it meant for the ESA to protect intrastate, non-commercial species. It failed to do either.

2. The Fifth Circuit Should Have Avoided Deciding That "Taking" an Endangered Species is The Precise "Regulated Activity" at Issue.

In the case below, the Fifth Circuit faced the exact same question this Court faced in *SWANCC*. It was asked to address whether an agency's (FWS) interpretation of a statute (ESA) violated the Commerce Clause. This required the court to either decide what activity was being regulated (GDF's planned development or the taking of karst invertebrates), or interpret the statute in a reasonable fashion as to avoid the constitutional question. The Fifth Circuit, disagreeing with the District Court's characterization of the regulated activity, wrestled with the constitutional question and (correctly) determined that the regulated activity was the taking of karst invertebrates.

However, as this Court explained in *SWANCC*, simply deciding what activity is actually being regulated raises a "significant constitutional question[]." *SWANCC*, 531 U.S. at 174. The Fifth Circuit violated the clear statement rule by addressing the FWS's application of the ESA without first finding a clear indication that Congress intended for the "take" prohibition to attach to an intrastate, non-commercial species, such as karst invertebrates.

3. The Fifth Circuit Should Have Avoided Deciding the Constitutional Issue Because FWS's Interpretation Raises Serious Federalism Concerns

The FWS's denial of the Petitioners' request to modify karst invertebrate habitat raises serious federalism concerns that the Fifth Circuit failed to address. Pursuant to the ESA, it is unlawful to "take" an endangered species, which "means to harass, *harm*, pursue, hunt, shoot wound, kill ...." 16 U.S.C. §§ 1532, 1538 (emphasis added). Furthermore, the FWS has defined "harm" to mean an act that injures wildlife, including "significant habitat modification or degradation ...." 50 C.F.R. § 17.3. The Petitioners wished to commercially develop their property. This would have required them to modify land inhabited by karst invertebrates. By regulating the Petitioners' land modification, the FWS clearly regulated land use. Such regulation impinged upon a "traditional and primary power" of the States. *SWANCC*, 531 U.S. at 174. Thus, FWS's construction of the ESA "readjust[s] the federal-state balance" thereby raising serious federalism questions. *SWANCC*, 531 U.S. at 174. In light of such concerns, before addressing the constitutionality of FWS's interpretation, the clear statement rule required the Fifth Circuit to find a clear indication from Congress that it meant for the take prohibition to apply to wholly intrastate, non-economic species.

4. The Fifth Circuit Should Have Avoided The "Far Reaching" Aggregation Theory of Commerce Clause Jurisdiction.

Finally, since the Fifth Circuit had to resort to "far reaching" Congressional authority to hold that the FWS's interpretation did not violate the Commerce Clause, it

should have looked for a statement that Congress meant to protect intrastate, non-economic species. In the case below, the court explained that to be lawful under the Commerce Clause, FWS's regulation of the Petitioners' "takes" must substantially affect interstate commerce. *GDF Realty*, 326 F.3d at 635. It began its analysis by determining that the ESA is an "economic regulation." *Id.* at 639-40. Then, according to the Fifth Circuit, it was proper to aggregate the taking of karst invertebrates with the taking of **all** other endangered species and determine whether this aggregate had a substantial effect on interstate commerce (the aggregation principle). *Id.* at 640. The Petitioners had conceded that this aggregate would have a substantial impact on interstate commerce. *Id.* at 639. Thus, the Fifth Circuit held that the FWS's application of the take prohibition to the Petitioners did not exceed Congress' authority under the Commerce Clause. *Id.* at 641.

Wickard v. Filburn, 317 U.S. 111 (1942), is recognized as the father of the aggregation principle. *See* Jim Chen, *Filburn's Legacy,* 52 Emory L.J. 1719, 1743 (2003) (The "crucial observation about the consumption of homegrown wheat enabled the Court to make the 'aggregation' argument for which *Wickard v. Filburn* is best known today ..."). In *Wickard,* the government charged the owner of a small farm with a penalty for growing wheat in excess of the allotments allowed under the Agricultural Adjustment Act of 1938, as amended. The owner countered that a portion of the wheat he grew was for consumption on his farm (*i.e.,* poultry feed, making flour, seeding) and therefore the Federal government could not regulate it pursuant to its authority over interstate commerce. The parties "stipulated a summary of the economics of the wheat industry" and the Court explained, "[c]ommerce among the states in wheat is large and important." 317 U.S.

at 125. Thus, even though the owner's growing of wheat for personal consumption had a trivial effect on interstate commerce, "his contribution, taken together with that of many others similarly situated, [was] far from trivial."[5] *Id.* at 128.

In *United States v. Lopez*, this Court recognized *Wickard* as a case involving the regulation of economic activity. Moreover, it explained that *Wickard* "is perhaps the most far reaching example of Commerce Clause authority over intrastate activity." *Lopez*, 514 U.S. at 560. If, considering the importance of the wheat market, Congress's regulation of growing wheat for personal use is "far reaching," then its regulation of harm to an intrastate species for which there is no market reaches even further. By relying on the aggregation principle, the court below skirted the Constitution's outer bounds. Thus, before resolving whether the FWS's application of the ESA violated the Commerce Clause, the court should have searched for a clear statement that the ESA's take prohibition covers intrastate, non-economic species.

Hence, the FWS's interpretation of the ESA

- forced the Fifth Circuit to decide what activity the ESA regulates;
- raised serious federalism concerns; and
- required the court to use a "far reaching" principle to hold that the interpretation was constitutional.

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[5] The *Wickard* Court explained that "[c]onsumption on the farm where grown appears to vary in an amount greater than 20 per cent of average production." *Wickard* 317 U.S. at 127.

Therefore, the FWS's interpretation invoked the "outer limits of Congress' power." *SWANCC*, 531 U.S. at 172. Consequently, the clear statement rule required the Fifth Circuit to search for and find a clear indication from Congress that the ESA's take prohibition attaches to wholly intrastate, non-economic species. It failed to do so. Moreover, had it looked, it would have come up empty handed.

B. The Fifth Circuit Should Not Have Upheld The FWS's Interpretation in Light of The ESA's Civil And Criminal Penalties.

A species that is solely intrastate, and that has no market or commercial value beyond mere "conjecture,"[6] is not one for which Petitioners should be subject to the ESA's civil and criminal sanctions for taking species. Because violations can result in serious civil and criminal penalties,[7] and Congress was not clear as to whether the ESA attaches to wholly intrastate, non-economic species, the Fifth Circuit should have construed the "take" provision in favor of the Petitioners.

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[6] *GDF Realty Investments, LTD v. Norton,* 326 F.3d 622, 638 (5th Cir. 2003) (stating "The *possibility* of future substantial effects of the Cave Species on interstate commerce, through industries such as medicine, is simply too hypothetical and attenuated from the regulation in question to pass constitutional muster .... Cave Species takes are neither economic nor commercial. There is no market for them; any future market is conjecture.") (emphasis in original) (citing *United States v. Morrison,* 529 U.S. 598, 612 (2000)).

[7] The ESA provides civil penalties of up to $25,000 for each knowing violation of the "take" provision. Criminal penalties include fines up to $50,000 for knowing violations and imprisonment for up to one year. *See* 16 U.S.C. § 1540(a)(1) (civil penalties); 16 U.S.C. § 1540(b)(1) (criminal violations).

The statutory definition of "take" does not answer the question whether that term necessarily includes species that are solely intrastate and without any identifiable market or commercial value. Indeed, the statute does not say that solely intrastate species are subject to regulation. 16 U.S.C. § 1531, *et seq.*; 16 U.S.C. § 1532(19) (*see supra,* discussing definition of "take"). The regulations are similarly silent. *See, e.g.,* 50 C.F.R. § 17.3 ("harm" defined).

Moreover, the legislative history does not answer the question of whether FWS can regulate an *intrastate* species that has no market or no commercial value. *See GDF Realty,* 326 F.3d at 367. Similarly, the plain meaning of the statute, in context with other sections of the ESA, is also silent on this question. *See, e.g.,* 16 U.S.C. § 1531, *et seq.*

Furthermore, the opinion below is itself contrary to any contention by FWS that it can regulate solely intrastate species. *See generally, GDF Realty,* 326 F.3d 622. Pointedly, while analyzing whether the "take" of the karst invertebrates would substantially affect interstate commerce, the court below stated, "To the extent FWS contends that the loss of the Cave Species would affect the scientific travel or publication industries, it offers no evidence that it would substantially do so. In fact, the minimal evidence presented by FWS indicates such an effect would be negligible." *GDF Realty,* 326 F.3d at 637. Despite its recognition that the "effect would be negligible," the court held the "take" provision, as applied in this case, would substantially affect interstate commerce and accordingly held the statute applicable to Petitioners. *Id.*

Because the statute is imprecise on the question whether Congress intended to regulate *wholly intrastate* species, and

because the statute allows imposition of penalties involving significant fines and imprisonment,[8] a court should construe any ambiguity in the statute in favor of Petitioners. As this Court stated in *United States v. Bass,* "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." 404 U.S. 336, 347 (1971) (setting aside the conviction "because the government has failed to show the requisite nexus with interstate commerce") (internal citation omitted).

Two policies serve as the basis for the rule of lenity. First, it serves to protect a person's right to fair warning: "Application of the rule of lenity ensures that criminal statutes will provide *fair warning* concerning conduct rendered illegal ...." *Liparota v. United States,* 471 U.S. 419, 427 (1985). Second, because of the "seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity." *Bass,* 404 U.S. at 348 (internal citations omitted). Thus, the rule of lenity is "reserved ... for those situations in which a reasonable doubt persists about a statute's intended scope even *after* resort to 'the language and structure, legislative history, and motivating policies' of the statute." *Moskal v. United States,* 498 U.S. 103, 108 (1990) (internal citations omitted; emphasis in original).

Moreover, this Court has stated, "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative to require that Congress should have spoken in language that is clear and definite." *Bass,* 404

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[8] Indeed, one of the Petitioners was "notified by FWS that he was under federal criminal investigation for possible endangered species takes." *GDF Realty,* 326 F.3d at 626.

U.S. at 347 (quoting *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-222 (1952)). Under the circumstances of Petitioners' case, even after examining the language, structure, and legislative history of the statute, uncertainty remains over whether Congress intended to extend the scope of the ESA to regulate wholly intrastate species that have no commercial or market value. *Moskal*, 498 U.S. at 108.

The Court's review is necessary to clarify the scope of FWS's jurisdiction over wholly intrastate species, which the ESA does not address, because severe civil and criminal penalties attach for any violations of the "take" prohibition.

II. Certiorari is Warranted to Clarify The Confusion in The Lower Courts on The Importance of The "Jurisdictional Element"

In *United States v. Lopez*, 514 U.S. 549, 558 (1995), this Court "identified three broad categories of activity that Congress may regulate under its commerce power." One of these categories is "activities that substantially affect interstate commerce." *Id.* at 559. Furthermore, *United States v. Morrison*, 529 U.S. 598 (2000), clarified that a court must consider four factors when determining whether a statute can be upheld as regulating an activity that substantially affects interstate commerce. The second of these factors is whether the legislation in question contains a "jurisdictional element" which might limit the statute's reach to a discrete set of activities that have an explicit connection to interstate commerce. *Id.* at 612. In *Lopez*, the Court described the jurisdictional element as language that would "ensure, through a case-by-case inquiry," that the regulated activity affects interstate commerce. *Lopez*, 514 U.S. at 561.

In both *Lopez* and *Morrison*, the lack of a jurisdictional element weighed in favor of finding that the statue at issue violated the Commerce Clause. *Lopez*, 514 U.S. at 561-62; *Morrison*, 529 U.S. at 611-13. Since *Lopez* and *Morrison* were decided, the lower courts have not consistently weighed the presence, or lack, of a jurisdictional element when determining whether Congress can constitutionally regulate an activity as one that substantially affects interstate commerce. Certiorari is necessary so the Court can clarify the importance of the "jurisdiction element" in deciding whether the application of particular legislation violates the Commerce Clause.

For example, in *United States v. McCoy*, 323 F.3d 1114, 1126 (9th Cir. 2003), the Ninth Circuit analyzed the application of a statute that contained a jurisdictional element that was "useless." McCoy was charged with possessing child pornography made with materials that traveled in interstate commerce in violation of 18 U.S.C. § 2252(a)(4)(B). Section 2252(a)(4)(B) provides that it is unlawful to produce sexually explicit pictures of a minor if the materials used to produce the picture have "been mailed or ... shipped or transported ...." The Ninth Circuit explained that the above quoted jurisdictional element "does not serve to limit application of the statute to a discrete set of cases that have a substantial effect on interstate commerce." *McCoy*, 323 F.3d at 1130. Thus, in light of a "useless" jurisdictional element, the Ninth Circuit looked to see whether there was "any substantial connection between [McCoy's] conduct and *any* interstate commercial activity." *Id.* at 1132. Finding none, the Court held that the statute was unconstitutional as applied.

The Fifth Circuit should have used an analysis similar to the Ninth Circuit's in *McCoy* because the take provision of the ESA does not contain a jurisdictional element. A nonexistent jurisdictional element is obviously less informative than a "useless" one. Thus, applying the Ninth Circuit's reasoning to the GDF case would lead a court to

determine whether GDF's conduct had a "substantial connection [to] any interstate commercial activity." *Id.* The Fifth Circuit held that GDF's conduct did not. *GDF Realty*, 326 F.3d at 636-39. However, it did not end its analysis at that point. Instead, the Fifth Circuit expanded its review beyond the facts of the case to include the "interdependence of [all] species" and examined whether the taking of all endangered species, in the aggregate, would substantially affect interstate commerce. *Id.* at 640.

In a case analogous to *GDF Realty*, the Eighth Circuit reviewed the constitutionality of applying the Americans With Disabilities Act (ADA) to prohibit Missouri from collecting a $2.00 annual fee in exchange for a placard that allowed disabled persons to use reserved parking spaces. *Klinger v. Director, Department of Revenue*, 366 F.3d 614 (8th Cir. 2004). The court reviewed the four *Morrison* factors and found the application of the ADA exceeded Congress's authority under the Commerce Clause. In addressing Congress's failure to include a jurisdictional element in the ADA, the Eighth Circuit explained such absence "might indicate that a statute is overinclusive, unconstitutionally sweeping within its ambit activities that have no explicit connection with or effect on interstate commerce." *Id.* at 618.

The Fifth Circuit, in contrast, placed little weight on the lack of a jurisdictional element in the ESA. Indeed, the Fifth Circuit's analysis seems to suggest that because there is no jurisdictional element to limit the ESA's "take" prohibition, it was free to broaden its review to include the impacts of *all* species on interstate commerce. *See GDF Realty*, 326 F.3d at 640 (agreeing with FWS that "takes of any species threaten the 'interdependent web' of all species."). Such an analysis conflicts with *Klinger*, and this Court's decisions, because under the Fifth Circuit's reasoning the lack of a jurisdictional element apparently makes it more likely that a statute would be found constitutional. Certiorari is therefore warranted to clarify

that when lower courts analyze statutes that do not contain a jurisdictional element, their analysis must ensure that the lack of such an element weighs in favor of the statute being found unconstitutional.

CONCLUSION

The Fifth Circuit failed to follow two fundamental rules of statutory construction that this Court has established. Furthermore, the lower courts are not clear on the importance of the "jurisdiction element" when examining whether an intrastate activity substantially affects interstate commerce. NAHB respectfully requests that the Court grant certiorari to address both of these issues.

August 19, 2004

Respectfully submitted,

Thomas J. Ward*
Felicia K. Watson
National Association of
Home Builders

* *Counsel of Record*